Supreme Court, U.S.
FILED
MAY 14 1997
OFFICE OF THE CLERK

No. 96-1629

IN THE

Supreme Court of the United States

October Term, 1996

HARVEY S. PEELER

Petitioner,

v.

SPARTAN RADIOCASTING, INC.
AND ALLAN RAY TEDDER

Respondents.

On Petition For a Writ Of Certiorari
To The South Carolina Supreme Court

BRIEF IN OPPOSITION

BRUCE W. SANFORD
Counsel of Record

HENRY S. HOBERMAN
DAVID S. WACHEN
MICHAEL J. LORENGER
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1500

Counsel for Respondents

WILLIAM U. GUNN
PERRY D. BOULIER
Holcombe, Bomar, Gunn & Bradford, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 585-4273

Of Counsel

QUESTION PRESENTED

Whether the Court should review the dismissal by the Supreme Court of South Carolina of a libel action brought by a public official when that court, after careful independent review, found that the public official had failed to present clear and convincing evidence of actual malice.

PARTIES TO THE PROCEEDINGS

Petitioner Harvey S. Peeler was the plaintiff in the Court of Common Pleas of Spartanburg County, where this case was initiated. Peeler was the respondent in the appeal to the Supreme Court of South Carolina.

Respondent Spartan Radiocasting, Inc., defendant and appellant below, owns and operates WSPA-TV in Spartanburg, South Carolina. It is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina.

Respondent Allan Ray Tedder, defendant and appellant below, was a reporter at WSPA-TV during the events at issue.

RULE 29.6 LISTING

Respondent Spartan Radiocasting, Inc. has no parent companies or publicly held, nonwholly-owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 LISTING ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. The Facts 2

B. The Lawsuit 6

C. The Appeal 9

REASONS FOR DENYING THE WRIT 11

I. RATHER THAN PRESENT A COMPELLING REASON TO GRANT CERTIORARI, PETITIONER MANUFACTURES A PHANTOM OPINION OF THE SUPREME COURT OF SOUTH CAROLINA THAT IS AT ODDS WITH THE PLAIN LANGUAGE OF THE REAL OPINION 11

Table of Contents Continued

Page

II. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY FOUND THAT PETITIONER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENTS ACTED WITH ACTUAL MALICE 13

A. The August 29 Report 15

B. The September 1 Report 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Page

Arizona v. Evans, 514 U.S. 1, 115 S. Ct. 1185 (1995) 13

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 16

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 14

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 14, 16

Masson v. New Yorker Magazine, 501 U.S. 496 (1991) 8, 19, 20

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 14, 19

Peeler v. Spartan Radiocasting, Inc., 478 S.E.2d 282 (S.C. 1996) . . . . . *passim*

Perez v. Scripps-Howard Broadcasting Co., 520 N.E.2d 198 (Ohio), *cert. denied*, 488 U.S. 870 (1988) 17, 19

Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991) 14, 17

Table of Authorities Continued

Cases

	Page
Secord v. Cockburn, 747 F. Supp. 779 (D.D.C. 1990)	16
Silvester v. American Broadcasting Cos., 650 F. Supp. 766 (S.D. Fla. 1986), *aff'd*, 839 F.2d 1491 (11th Cir. 1988)	17
St. Amant v. Thompson, 390 U.S. 727 (1968)	14
Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987)	18
Texas v. Mead, 465 U.S. 1041 (1984)	12
In re UPI, 106 Bankr. 323 (D.D.C. 1989)	15
United States v. Johnston, 268 U.S. 220 (1925)	12

Rules

Sup. Ct. R. 10 . . . . . 1, 12, 13

No. 96-1629

IN THE

Supreme Court of the United States

October Term, 1996

HARVEY S. PEELER

Petitioner,

v.

SPARTAN RADIOCASTING, INC.
AND ALLAN RAY TEDDER

Respondents.

On Petition For a Writ Of Certiorari To The South Carolina Supreme Court

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Petition challenges the unremarkable application by South Carolina's highest court of this Court's well-settled constitutional protections in a public official libel action. In reversing the judgment of the trial court, the Supreme Court of South Carolina held that Petitioner failed to prove by clear and convincing evidence that Respondents acted with actual malice in broadcasting allegedly false and defamatory statements about him.

Rather than offer a compelling reason for this Court to grant his Petition, as required by Supreme Court Rule 10, Petitioner ignores the plain language of the lower court's opinion and contends that the court below "made a *de novo* review of falsity, [and erroneously] applied a clear and convincing evidence standard to the issue of falsity . . . ."

Pet. at 13. The majority of Petitioner's Argument section is devoted to this proposition.

In fact, in a 7-page *per curiam* decision, the Supreme Court of South Carolina explicitly states no less than four times that it was steering clear of falsity and, instead, was conducting a *de novo* review of the record to determine whether Petitioner had proved actual malice by clear and convincing evidence. *See, e.g., Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996) (*per curiam*) ("[W]e are required to conduct an independent *de novo* review of the record *only* on the issue of actual malice.") (emphasis added). The court went on to recognize, correctly, that the record in this case contains nothing that even approaches clear and convincing evidence of actual malice. But this Court need look no further than the four corners of the decision below to dispatch the Petition.

A. The Facts

This lawsuit arises from two news reports broadcast by Respondent Spartan Radiocasting's television station, WSPA-TV in Spartanburg, South Carolina, concerning the acrimonious 1988 campaign for the District 14 seat in the South Carolina Senate.

When it appeared that Petitioner Harvey S. Peeler would be reelected in an unopposed election, former Cherokee County Councilman J.R. Stroupe decided to mount a late petition drive to put his name on the ballot as a challenger to Peeler. On August 29, 1988, three days before the September 1 petition deadline, several local newspapers reported that there were questions about the authenticity of some of the signatures on Stroupe's petition, resulting in an

investigation by the State Law Enforcement Division ("SLED"). (R. at 142-45, 505.)[1] On that same day, WSPA assigned Respondent Allan Ray Tedder, a WSPA reporter for nearly ten years, to cover the story for that evening's newscast. (R. at 142-43, 242, 328.) Tedder contacted the South Carolina Election Commission, the Cherokee County Election Office, and SLED, which confirmed its investigation. (R. at 144-45.) He also spoke with Stroupe on three separate occasions -- first over the telephone, second in person but off-camera, and finally on-camera; he also interviewed Stroupe supporters. (R. at 169-71, 231-32.) According to Tedder, during his in-person, off-camera conversation with Stroupe, Stroupe said he believed either Peeler or his supporters had caused the forgeries to occur. (R. 151, 171.) Stroupe's supporters echoed the same sentiment, with two supporters also opining that Peeler was involved. (R. at 151, 170-71, 228, 231-32.) Tedder also contacted Peeler, who denied any involvement. (R. at 328-29.)

Tedder prepared a one-minute summary for that evening's six o'clock news. (R. at 332-33.) The report followed a typical television news format for day-to-day campaign coverage: (1) issue; (2) accusation; (3) denial; and (4) "stand-up" closing by reporter. Tedder reported the following:

> **Ray Tedder**: These SLED agents are poring over petitions that have been filed by J.R. Stroupe, a former Cherokee County Councilman who wants to run for the State Senate. The State Election Commission says that twenty people have signed

---

[1] "R." refers to the Record On Appeal submitted to the Supreme Court of South Carolina.

> affidavits saying that they didn't sign the petitions; that someone forged their signatures. These agents are trying to find out if there are more. At Stroupe's Service Station near Thickety Mountain, supporters are claiming it's just dirty politics.
> **J.R. Stroupe**: Everything was fine until I asked to see them.
> **Tedder**: Stroupe says he has hundreds of people working for him trying to get enough signatures to get him on the ballot in November, opposite incumbent State Senator Harvey Peeler. He says he doesn't know who might have forged the signatures, but he claims Peeler or his supporters engineered this problem. Peeler says that's nonsense.
> **Harvey Peeler**: The first I heard about it, Ray, was yesterday afternoon. It took me totally by surprise.
> **Tedder**: For election officials, finding out who did it is not as important as finding out how many signatures are valid. They have to certify the petition by September the first. In Gaffney, Ray Tedder, TV-7, Eyewitness News.

Peeler, 478 S.E.2d at 283. Three days later, on September 1, Tedder prepared a one-minute follow-up report about the failure of Stroupe's petition drive. It again followed the familiar campaign coverage format, and contained reactions from the public:

> **Tedder**: According to South Carolina Election Officials, twenty people claim their names were forged on these petitions. That helped keep J.R. Stroupe twenty-seven away from having enough to get on the ballot opposite incumbent State Senator Harvey Peeler. These SLED agents sorting the petitions are continuing to investigate hoping to find

> out who committed the crime. J.R. Stroupe is conducting his own investigation. Stroupe wants to prove he had nothing to do with the forgeries, and the supporters who gathered at his service station believe someone in the Peeler camp set Stroupe up. Peeler says he had nothing to do with it. But Peeler will be hard pressed to convince a lot of people. They believe it's just Cherokee County politics as usual.
>
> **John Gimball**: It wouldn't surprise me. I mean, there's so much things that go on that people won't say nothing about.
>
> **Arthur Hall**: My opinion is that Harvey's got something to do with it.
>
> **Tedder**: Stroupe says he's not decided whether to wage a write-in campaign, but his supporters say they will carry on one with or without his active participation. In Cherokee County, Ray Tedder, TV-7, Eyewitness News.

Id. at 283-84. Although Peeler did not contact Respondents following the airing of the August 29 report, in which he was quoted (R. at 333-34), he visited WSPA on September 2 to complain that he was not contacted for comment prior to the September 1 report. (R. at 334-44, 346, 348.) He did not, however, complain that any of the statements in either broadcast was false. (R. at 369-73.) When the news director at the time, Harvey Cox, offered to broadcast a follow-up report to allow Peeler another opportunity to respond, Peeler declined the offer. (R. at 275.)

Senator Peeler was reelected to the South Carolina Senate in November 1988. (R. at 360-61.)

B. The Lawsuit

For nearly two years after Senator Peeler's reelection, WSPA heard nothing further about the broadcasts from Peeler. On August 8, 1990, he filed a Complaint alleging that he had been defamed by the two broadcasts, but failed to identify the specific statements alleged to be false and defamatory. On June 5, 1992, Respondents moved for summary judgment on the grounds that neither broadcast contained any false statement, and that even if there had been a false statement, there was no evidence that it had been made with actual malice. The trial court denied the motion with little explanation.

On June 15, 1992, a five-day trial began. Peeler introduced the videotape of the two reports. As to the August 29 report, Tedder testified that Stroupe had told him during their off-camera conversation that he believed Peeler or his supporters had committed the forgeries. (R. at 151, 171.) Because Peeler neglected to call Stroupe as a witness, Peeler was unable to offer any affirmative evidence that Stroupe had not made the accusation against Peeler.[2]

---

[2] Thus, Petitioner misrepresents the evidence when he claims that "the evidence presented at trial showed that Stroupe never made the accusation and that Tedder knew this." (Pet. at 2.) Indeed, later in the Petition he concedes that Tedder testified at trial that the accusation occurred off-camera, and that Haynes Mullinax, who was "*present* at the grocery store when Tedder talked with Stroupe," was not privy to that conversation, having "*observed* the on-camera interview" only. (Pet. at 3 (emphasis added).) In addition, Petitioner neglects to mention that, at one time, he sued Stroupe for libel based solely on the statement that he now claims Stroupe never made. (R. at 517-29.) In support of his motion for summary judgment in that case, Petitioner stated in a sworn affidavit that Stroupe had in fact accused him of forgery. (R. at 530 ¶ 2(b).)

With regard to the September 1 broadcast, which was taped by WSPA and voluntarily provided to Petitioner by WSPA at the September 2 meeting, (R. at 112, 349-50), Petitioner insisted that the report on the videotape was not the one that actually aired. The "real" broadcast, he told the jury, was worse because the station's tape did not include the anchor's "lead-in." (R. at 247-48, 349.) To support his contention that the "real" broadcast was worse than the one before the jury, Peeler offered hearsay testimony that his mother told him that the September 1 newscast contained a still picture of him in addition to Tedder's report. (R. at 334-35.) Since he had not seen the news that evening, Peeler was unable to confirm his mother's recollection. (R. at 334-35.)

Peeler then suggested to the jury that Tedder and WSPA had destroyed the supposed "worse" videotape. Peeler brought back former news director Harvey Cox, who had since been terminated by WSPA. (R. at 267, 275.) Cox testified that an air-check tape[3] of the September 1 newscast could not be located. He speculated that the air-check might have been erased, but did not explain how he eliminated the equally plausible possibility that the September 1 newscast had never been recorded. (R. at 249-50.) However, he did testify that "he did not mean to suggest that he thought that Tedder had [erased it.]" (R. at 268.)

At the close of Peeler's case, Respondents moved for a directed verdict, arguing that Peeler had not met his

---

[3] Many television stations make a real-time tape of their programs as they are broadcast, called an "air-check." There is no legal requirement that television stations make or retain "air-check" tapes, and such tapes often are unavailable or of poor quality. (R. at 271.)

burden of proving by clear and convincing evidence that a false and defamatory statement had been made with actual malice. (R. at 387-91, 393-401.) The motion was denied. (R. at 408-09.) Convinced that Peeler had not come close to meeting the weighty constitutional burdens facing a public official libel plaintiff, Respondents chose not to offer any testimony. (R. at 410.)

The trial court's instructions to the jury were long and complex. The trial judge gave the jury two different definitions of "actual malice." First he instructed the jury that "actual malice" means knowingly or recklessly publishing false statements.[4] Later in his instructions, he told the jury that actual malice means conduct that is "willful, wanton, or reckless or a conscious indifference or a reckless disregard of the rights of others." (R. at 421, 430.)

Not surprisingly, after approximately two hours of deliberations, the jury was baffled. It asked the court for "[t]he definitions such as defamatory, preponderance, words like that that were called out in here," and a copy of the written charge. (R. at 459-60.) Instead of providing one, the judge read the entire charge again, including the instructions on presumed damages and both definitions of actual malice. (R. at 459-74.) Respondents' counsel requested that the jury be provided with a written copy of the definition of actual malice as it relates to liability. The trial court rejected the request. (R. at 475.)

---

[4] The trial judge failed to abide by this Court's admonition that "[i]n place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Masson v. New Yorker Magazine*, 501 U.S. 496, 511 (1991).

The same day, the jury returned a verdict for Peeler and awarded $50,000 in actual damages and $625,000 in punitive damages. (R. at 476-77.) Respondents promptly moved for judgment notwithstanding the verdict, a new trial, a new trial *nisi* as to both actual and punitive damages, and an independent review of the punitive damage verdict. (R. at 477-79.)

On December 22, 1992, the trial court denied all of Respondents' post-trial motions with no explanation other than the conclusory statement that there was "sufficient evidence" to support the jury's verdict. (R. at 6.) The trial court also reviewed the punitive damage verdict and held that it was "proper." (R. at 14-15.)

C. The Appeal

On January 13, 1993, Respondents appealed to the Supreme Court of South Carolina. After full briefing by the parties, the court heard argument on November 16, 1994. Thirteen months later -- on December 19, 1995 -- the court informed the parties that Justice Toal, a member of the panel who had heard argument, had decided to recuse herself. Justice Toal's husband, an attorney in private practice, had been retained by Petitioner's counsel to handle his domestic relations situation shortly *after* the court heard oral argument in this case. *See* Motion for Reargument and Memorandum in Support, filed Jan. 31, 1996. This served as the basis for Justice Toal's recusal.

Respondents moved for reargument, which was granted. A judge from the South Carolina Court of Appeals sat in Justice Toal's place at the second argument. The reconstituted panel heard argument on April 16, 1996.

On November 18, 1996, the court reversed the jury's verdict for Petitioner, finding after conducting *de novo* review that Petitioner had failed to prove actual malice by clear and convincing evidence. *Peeler*, 478 S.E.2d at 285. As to the August 29 report, the court found that,

> At best, Tedder may have practiced sloppy journalism by referring to Peeler rather than only his supporters, however, there is no evidence in the record that he did so with actual malice.

Id. As to the September 1 follow-up report, the court said,

> The testimony of [Hall and Gimball] does not clearly show that Tedder deliberately misrepresented his interviews with them. Tedder's comment prior to airing these quotes may have been ambiguous ["a lot of people . . . believe it's just Cherokee County politics as usual."], but without additional evidence, we hold this does not amount to clear and convincing evidence of actual malice.

Id. In announcing its decision, the court explicitly rejected Respondents' argument that it was required to conduct an independent review of the record to determine whether Petitioner had proven falsity by clear and convincing evidence. Instead, the court accepted Petitioner's argument that it was "required to conduct an independent *de novo* review of the record *only* on the issue of actual malice." *Id.* at 284 (emphasis added). On January 13, 1997, the Supreme Court of South Carolina denied Petitioner's request for a rehearing. This Petition followed.

REASONS FOR DENYING THE WRIT

I. RATHER THAN PRESENT A COMPELLING REASON TO GRANT CERTIORARI, PETITIONER MANUFACTURES A PHANTOM OPINION OF THE SUPREME COURT OF SOUTH CAROLINA THAT IS AT ODDS WITH THE PLAIN LANGUAGE OF THE REAL OPINION.

Petitioner asks this Court to re-do the careful, *de novo* work of South Carolina's highest court in assessing evidence of actual malice in an ordinary public official libel case. *Peeler*, 478 S.E.2d at 284. Petitioner does not quarrel with the existing constitutional standard. He does not dispute that he is a public official, that he bears the constitutional burden of proving actual malice, that he must prove actual malice by clear and convincing evidence, that the Supreme Court of South Carolina properly defined the term actual malice, or that the court was required to conduct an independent review of the record on actual malice. Nor does he advocate a departure from, or even an extension of, these established principles.

Instead, he puts words in the mouths of South Carolina's Justices, asserting that they conducted a *de novo* review of the evidence of falsity, not actual malice, and erroneously applied the clear and convincing standard to their phantom falsity analysis. The Justices said, and did, no such thing. Petitioner ignores at least 4 unambiguous statements by the court:

- We agree our scope of review *on the issue of actual malice* is a *de novo* review to determine if there is clear and convincing evidence. *However, we do not agree this is the proper scope of review on the issue of falsity*. *Id.* at 284 (emphasis added).

- [W]e are required to conduct an independent *de novo* review of the record *only* on the issue of actual malice. *Id.* (emphasis added).

- At oral argument, appellants in essence stated if we declined to adopt a *de novo* review on the evidence of falsity, [which the court has done,] *the focus of this appeal should be on whether there is clear and convincing evidence of actual malice*. *Id.* at 284 n.5 (emphasis added).

- Pursuant to a *de novo* review of the record, we hold there is not clear and convincing evidence to support a finding of actual malice. *Id.* at 285.

This Court simply does not disregard the plain language of lower court decisions, or re-plow fields that have already been tilled by a State's highest court. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) ("We do not grant a certiorari to review evidence and discuss specific facts") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Petitioner's plea for relief amounts to nothing more than an argument that the lower court did not mean what it

actually said, and that it misapplied a properly stated rule of law.[5] These are hardly the "compelling" reasons for certiorari contemplated by Rule 10.

II. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY FOUND THAT PETITIONER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENTS ACTED WITH ACTUAL MALICE.

Spirited accusations of political chicanery, trenchant barbs between candidates, finger pointing, lawsuits -- this, unfortunately, is the familiar face of politics and electioneering in America today. The District 14 race for State Senate in South Carolina had it all, and reporter Ray Tedder did his best to report on the accusations, the ensuing investigation by a state agency, and the predictable denials from both camps. This is not the stuff of actual malice.

The decades-old actual malice rule was virtually tailor-made to protect news reporting about hard-fought,

---

[5] After erroneously arguing that the Supreme Court of South Carolina conducted a review of falsity, not actual malice, Petitioner suggests that the court should not have used the clear and convincing standard in its falsity analysis. Even if the court *had* conducted a review of falsity, which it did not, and *had* applied the higher evidentiary standard for that review, which it did not, such a decision would fall within the court's discretion and this Court's First Amendment jurisprudence. This Court has set the *minimum* standards required to satisfy the Constitution; "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 1190 (1995).

emotionally-charged local elections like this one. The actual malice yardstick in part reflects the recognition that the press must be free to cover even the most raucous political campaigns and activities without fear of liability for mere negligence. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As the Fourth Circuit recently observed:

> In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it [publishes] is true. If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment.

Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir.) (citations omitted), *cert. denied*, 501 U.S. 1212 (1991).

To recover for libel, therefore, a public official has the burden of proving by clear and convincing evidence that any allegedly defamatory statements about him were published with knowledge that the statements were false or with "a 'high degree of awareness of . . . [their] probable falsity.'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (citation omitted); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (reckless disregard is "equated . . . with subjective awareness of probable falsity"); *New York Times Co.*, 376 U.S. at 279-80.

After full briefing, two oral arguments, and a *de novo* review of the complete record, the Supreme Court of South Carolina found that a public official embroiled in a tough re-election campaign had failed to meet his heavy burden of proving actual malice by clear and convincing evidence. The record fully supports the court's determination.

A. The August 29 Report

In his August 29 report, reporter Ray Tedder described some of the developments in the heated District 14 State Senate race to the viewers of Cherokee County. In a one-minute report, he conveyed the allegations of campaign fraud, the pending investigation by the state agency charged with overseeing the election, and the positions of both candidates on the allegations. *See In re UPI*, 106 Bankr. 323, 330 (D.D.C. 1989) (publishing accused's denial eliminates risk publisher will be viewed as endorsing reported charge). He paraphrased a private, off-camera conversation he had with J.R. Stroupe, in which Stroupe told Tedder that he believed that Peeler or his supporters had "caused these forgeries to occur." (R. at 151, 169-71.)

Petitioner does not dispute that Stroupe and his supporters accused Peeler's *supporters* of having "engineered this problem." Pet. at 4. The only issue he raised at trial, and again on this appeal, was whether Stroupe also accused Peeler himself. Petitioner even concedes that four local newspapers had previously reported that "Stroupe had accused Peeler's supporters of involvement in the forgeries." Pet. at 5.

At trial, Petitioner did not produce any direct evidence that Tedder had deliberately misreported Stroupe's accusation. Tedder testified that Stroupe had told him

shortly before broadcast that he suspected that Peeler or his supporters were behind the forgeries. (R. at 170-71.) Remarkably, Petitioner did not call Stroupe as a witness to refute Tedder's recollection that Stroupe had told Tedder that he believed Peeler was involved. In fact, Petitioner offered *no* evidence that anyone at WSPA questioned whether Stroupe had made the charge. And Tedder testified that, even after four years, he still believed that the broadcasts were fair and accurate reports of what Stroupe told him.[6] (R. at 151, 167.)

Petitioner's only evidence that purported to show actual malice was second-hand testimony about *Stroupe's* bias and state of mind (not Tedder's) at the time of the interview, and allegations that Tedder somehow "staged" the on-camera appearance. Alone or collectively, these allegations do not come close to proving actual malice by clear and convincing evidence.[7]

---

[6] Petitioner calls into question Tedder's credibility in an attempt to bolster his sagging actual malice argument. But, questioning Tedder's credibility is not tantamount to providing affirmative evidence of actual malice. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984) ("discredited testimony is not considered a sufficient basis for drawing a contrary conclusion"); *Secord v. Cockburn*, 747 F. Supp. 779, 793 n.10 (D.D.C. 1990) (questioning plausibility of defendant's testimony is not sufficient for fulfilling "affirmative duty" to prove actual malice). Moreover, Petitioner distorts the record in saying that Tedder, at his deposition, could only remember Stroupe accusing Peeler's supporters. (Pet. at 3-4.) In fact, Tedder remembered Stroupe saying "what we said in the story." (R. at 154.)

[7] Petitioner also urges that Respondents' supposed motive to "scoop" the competition is evidence of actual malice. (Pet. at 22.) This Court has rejected a similar theory. *See Harte-Hanks*, 491 U.S. at 667.

Stroupe's bias or state of mind is irrelevant to *the publisher's* subjective belief that the accusation was made. *See Reuber*, 925 F.2d at 715 ("[a]ctual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest"). Likewise, Petitioner's assertion that Stroupe's on-camera appearance was "staged," simply because Stroupe donned a clean shirt and sunglasses for the broadcast, is, at best, irrelevant hyperbole. Petitioner did not even establish at trial that Tedder had orchestrated Stroupe's appearance. (R. at 181, 229-30.) Even if Petitioner had proven that Tedder provided a shirt and sunglasses to Stroupe, these actions would be inconsequential. Taking reasonable steps to improve the quality of a broadcast is "essentially neutral," and certainly far afield of the clear and convincing evidence required to prove actual malice. *See, e.g., Perez v. Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 204 (Ohio) (rehearsal of questions does not affect actual malice determination), *cert. denied*, 488 U.S. 870 (1988); *Silvester v. American Broadcasting Cos.*, 650 F. Supp. 766, 779 (S.D. Fla. 1986) (allowing witnesses who support reporter's "thesis" to rehearse and retape without giving same opportunity to others does not "rise to the level of constitutional malice"), *aff'd*, 839 F.2d 1491 (11th Cir. 1988).

Based on this record, the Supreme Court of South Carolina reached the unsurprising conclusion that evidence about the state of mind of someone other than the publisher, coupled with the unproven allegation that a reporter took steps to make his broadcast look better, is not clear and convincing proof of actual malice.

B. The September 1 Report

In his follow-up report of September 1, Tedder again included comments from both camps, as well as "sound-bites" from two citizens -- Gimball and Hall -- supporting the unremarkable conclusion that some members of the public viewed the petition controversy as "Cherokee County politics as usual." Petitioner claims that Tedder acted with actual malice because he edited the interviews with Gimball and Hall and, Petitioner claims, took portions of the interviews "out of context."

The record does not support Petitioner's claims. Tedder testified that he asked Gimball and Hall open-ended questions. (R. at 192-93.) He also stated that he understood Hall to say that Peeler might have had something to do with the forgeries or the investigation. (R. at 186-87, 196-97.) Although Hall testified that he had not intended to refer to the forgeries, he admitted that Tedder could have asked about them. (R. at 239-40.) The broadcast itself is at best ambiguous as to whether Hall's statement refers to the investigation or forgeries. Gimball testified that his principal gripe was that his sound-bite "was just one little segment of what we had discussed." (R. at 129.) He did, however, acknowledge that at the time he was interviewed, there were people who would have thought that Peeler or his associates were involved in the controversy. (R. at 136-37.)

Petitioner apparently quibbles with Tedder's editing decisions, suggesting that the broadcast should have contained more of the Gimball and Hall interviews. This argument ignores the realities and constraints of television news, and also threatens the time-honored tradition of leaving editing decisions to those in newsrooms, not courtrooms. *See Tavoulareas v. Piro*, 817 F.2d 762, 796

(D.C. Cir.) (*en banc*) (Courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.'") (citation omitted), *cert. denied*, 484 U.S. 870 (1987). As one court explained, "In any broadcast, there will be a selection made as to what is newsworthy. The relevant question is whether that selection is made with a view toward dissemination of false information." *Perez*, 520 N.E.2d at 204 (citations omitted). Here, the record contains ample evidence that only two factors were considered when the broadcast was edited: clarity and length of time. (R. at 168, 201.) There is no evidence that Tedder edited the Gimball and Hall interviews with anything but good faith, let alone "with a view toward dissemination of false information," *Perez*, 520 N.E.2d at 204, or with the intent to quote Gimball and Hall out of context.[8]

This Court's decision in *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), prominently featured in the Petition, is not to the contrary. In *Masson*, the petitioner, seeking reversal of the lower court's grant of summary judgment, pointed to evidence in the record of *wholesale and*

---

[8] The "missing" air-check tape and the testimony of a fired news director add nothing of constitutional significance to the Petition. Petitioner claims that Respondents intentionally erased the air-check to hide unfavorable evidence, but he failed to prove at trial that the tape was deliberately erased. *See Peeler*, 478 S.E.2d at 285 (Petitioner failed to prove erasure was not routine, negating possibility of actual malice). Even the former news director, Harvey Cox, fired by the station before trial, did not believe that Tedder had erased the air-check. (R. at 268-69.) Similarly, Cox's "expert" opinion that Gimball and Hall's comments may have been taken out of context, based entirely on his impressions of what Hall and Gimball said at trial, (R. at 255), does not address state of mind *at the time of the broadcast*. *See New York Times Co.*, 376 U.S. at 287.

deliberate fabrication of quotations that the petitioner brought to the attention of the respondent-magazine's fact-checker prior to publication. *Id.* at 500. This Court found that the evidence in the record, taken in the light most favorable to the petitioner, raised a genuine issue of material fact as to actual malice and falsity, precluding summary judgment. *Id.* at 521. In making this determination, the Court held

> that a *deliberate* alteration of the words uttered by a *plaintiff* does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.

Id. at 517 (emphasis added) (citations omitted).

Here, unlike *Masson*, there is no evidence of fabrication or alteration, no evidence of *deliberate* fabrication or alteration, no evidence of pre-publication knowledge of falsity, and no evidence of any "material change in meaning" of the broadcast resulting from Tedder's editing decisions. *Id.* As the Supreme Court of South Carolina correctly recognized, the testimony in this case "does not clearly show that Tedder *deliberately* misrepresented his interviews with [Gimball and Hall]," *Peeler*, 478 S.E.2d at 285 (emphasis added), and therefore does not rise to the level of clear and convincing evidence that Tedder edited the September 1 broadcast with actual malice.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

Bruce W. Sanford
Counsel of Record

Henry S. Hoberman
David S. Wachen
Michael J. Lorenger
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1500

Counsel for Respondents

William U. Gunn
Perry D. Boulier
Holcombe, Bomar, Gunn & Bradford, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 585-4273

Of Counsel